

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KATRINA WISCHMANN,
Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social
Security,
Defendant.

)
) No. CV-09-179-CI
)
)
) ORDER GRANTING DEFENDANT'S
) MOTION FOR SUMMARY JUDGMENT
) AND DENYING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
)
)
)
)
)
)
)

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 13, 15.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Nancy Mishalanie represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and **GRANTS** Defendant's Motion for Summary Judgment.

JURISDICTION

Plaintiff Katrina Wischmann (Plaintiff) filed for supplemental security income (SSI) on November 26, 2007. (Tr. 18.) Plaintiff alleged an onset date of July 11, 2004. (Tr. 55.) Benefits were denied initially and on reconsideration. (Tr. 32, 38.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held before ALJ Gene Duncan on December 10, 2008. (Tr. 268-309.) Plaintiff was represented by counsel and testified at the hearing.

1 (Tr. 269-71, 277-98.) Medical expert Dr. Ronald Klein and vocational
2 expert Fred Cutler also testified. (Tr. 271-77, 298-309.) The ALJ
3 denied benefits (Tr. 18-28) and the Appeals Council denied review.
4 (Tr. 5.) The instant matter is before this court pursuant to 42
5 U.S.C. § 405(g).

6 **STATEMENT OF FACTS**

7 The facts of the case are set forth in the administrative hearing
8 transcripts, and will therefore only be summarized here.

9 Plaintiff has a high school diploma and a certificate from a
10 computer repair training course. (Tr. 269-70.) Her only work
11 experience is a brief stint as a hostess in a restaurant during high
12 school. (Tr. 279.) Plaintiff testified that pain in her right side,
13 low back, neck, shoulders, buttocks and legs prevents her from
14 working. (Tr. 280.) She has pain on a daily basis and nothing
15 relieves her pain. (Tr. 281.) At the time of the hearing, she was
16 taking over-the-counter pain relievers and had not seen a physician
17 for more than year. (Tr. 282.) She tries to relieve pain by taking
18 hot showers, laying down with a heating pad and propping her knees
19 with a pillow. (Tr. 283.) Plaintiff testified she does not have
20 mental health problems and she has no memory or concentration
21 problems. (Tr. 270, 288.)

22 **STANDARD OF REVIEW**

23 Congress has provided a limited scope of judicial review of a
24 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the
25 Commissioner's decision, made through an ALJ, when the determination
26 is not based on legal error and is supported by substantial evidence.
27 *See Jones v. Heckler*, 760 F. 2d 993, 995 (9th Cir. 1985); *Tackett v.*
28 *Apfel*, 180 F. 3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's]

determination that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Sec'y of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a

1 finding of either disability or nondisability, the finding of the
2 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
3 1230 (9th Cir. 1987).

4 SEQUENTIAL PROCESS

5 The Social Security Act (the "Act") defines "disability" as the
6 "inability to engage in any substantial gainful activity by reason of
7 any medically determinable physical or mental impairment which can be
8 expected to result in death or which has lasted or can be expected to
9 last for a continuous period of not less than twelve months." 42
10 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that
11 a Plaintiff shall be determined to be under a disability only if his
12 impairments are of such severity that Plaintiff is not only unable to
13 do his previous work but cannot, considering Plaintiff's age,
14 education and work experiences, engage in any other substantial
15 gainful work which exists in the national economy. 42 U.S.C. §§
16 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability
17 consists of both medical and vocational components. *Edlund v.*
18 *Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

19 The Commissioner has established a five-step sequential
20 evaluation process for determining whether a claimant is disabled. 20
21 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is
22 engaged in substantial gainful activities. If the claimant is engaged
23 in substantial gainful activities, benefits are denied. 20 C.F.R. §§
24 404.1520(a)(4)(I), 416.920(a)(4)(I).

25 If the claimant is not engaged in substantial gainful activities,
26 the decision maker proceeds to step two and determines whether the
27 claimant has a medically severe impairment or combination of
28 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If

1 the claimant does not have a severe impairment or combination of
2 impairments, the disability claim is denied.

3 If the impairment is severe, the evaluation proceeds to the third
4 step, which compares the claimant's impairment with a number of listed
5 impairments acknowledged by the Commissioner to be so severe as to
6 preclude substantial gainful activity. 20 C.F.R. §§
7 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App.
8 1. If the impairment meets or equals one of the listed impairments,
9 the claimant is conclusively presumed to be disabled.

10 If the impairment is not one conclusively presumed to be
11 disabling, the evaluation proceeds to the fourth step, which
12 determines whether the impairment prevents the claimant from
13 performing work he or she has performed in the past. If plaintiff is
14 able to perform his or her previous work, the claimant is not
15 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
16 this step, the claimant's residual functional capacity ("RFC")
17 assessment is considered.

18 If the claimant cannot perform this work, the fifth and final
19 step in the process determines whether the claimant is able to perform
20 other work in the national economy in view of his or her residual
21 functional capacity and age, education and past work experience. 20
22 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482
23 U.S. 137 (1987).

24 The initial burden of proof rests upon the claimant to establish
25 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
26 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d
27 1111, 1113 (9th Cir. 1999). The initial burden is met once the
28 claimant establishes that a physical or mental impairment prevents him

1 from engaging in his or her previous occupation. The burden then
2 shifts, at step five, to the Commissioner to show that (1) the
3 claimant can perform other substantial gainful activity, and (2) a
4 "significant number of jobs exist in the national economy" which the
5 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.
6 1984).

7 **ALJ'S FINDINGS**

8 At step one of the sequential evaluation process, the ALJ found
9 Plaintiff has not engaged in substantial gainful activity since
10 November 26, 2007, the application date. (Tr. 20.) At step two, he
11 found Plaintiff has the following severe impairments: sacroiliitis and
12 a persistent disc bulging/herniation at the L5-S1 level without
13 evidence of nerve compression or displacement. (Tr. 20.) The ALJ
14 specifically found indications of depression and anxiety disorders are
15 not severe impairments. (Tr. 20.) At step three, the ALJ found
16 Plaintiff does not have an impairment or combination of impairments
17 that meets or medically equals one of the listed impairments in 20
18 C.F.R. Part 404, Subpt. P, App. 1. (Tr. 23.) The ALJ then determined:

19 [C]laimant has the residual functional capacity for a
20 limited range of *light* and wide range of *sedentary* level
21 work activity. Specifically, she can lift 20 pounds
22 occasionally and 10 pounds regularly/frequently, but could
23 only stand/walk alternatively two hours in an 8-hour
workday. She can only occasionally operate foot controls,
bend, stoop or crouch, and was restricted from climbing,
unprotected heights (no ropes, ladders, or scaffolds) or
dangerous machinery.

24 (Tr. 24.) At step four, the ALJ found Plaintiff has no past relevant
25 work. (Tr. 26.) After considering Plaintiff's age, education, work
26 experience, and residual functional capacity and the testimony of a
27 vocational expert, the ALJ found there are jobs that exist in
28 significant numbers in the national economy that Plaintiff can

1 perform. (Tr. 26.) Thus, the ALJ concluded Plaintiff has not been
2 under a disability, as defined in the Social Security Act, since
3 November 26, 2007, the date the application was filed. (Tr. 27.)

4 ISSUES

5 The question is whether the ALJ's decision is supported by
6 substantial evidence and free of legal error. Specifically, Plaintiff
7 asserts the ALJ did not properly consider her testimony or the opinion
8 of one of her treating providers. (Ct. Rec. 16 at 16-17.) Defendant
9 argues the ALJ properly evaluated the medical evidence and properly
10 found Plaintiff's allegations regarding her limitations not credible.
11 (Ct. Rec. 16 at 7-19.)

12 DISCUSSION

13 1. Credibility

14 Plaintiff argues the ALJ's credibility finding does not properly
15 identify the testimony he determined to be not credible. (Ct. Rec. 14
16 at 16-17.) In social security proceedings, the claimant must prove
17 the existence of a physical or mental impairment by providing medical
18 evidence consisting of signs, symptoms, and laboratory findings; the
19 claimant's own statement of symptoms alone will not suffice. 20
20 C.F.R. § 416.908. The effects of all symptoms must be evaluated on
21 the basis of a medically determinable impairment which can be shown to
22 be the cause of the symptoms. 20 C.F.R. § 4416.929.

23 Once medical evidence of an underlying impairment has been shown,
24 medical findings are not required to support the alleged severity of
25 the symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).
26 If there is evidence of a medically determinable impairment likely to
27 cause an alleged symptom and there is no evidence of malingering, the
28 ALJ must provide specific and cogent reasons for rejecting a

1 claimant's subjective complaints. *Id.* at 346. The ALJ may not
2 discredit pain testimony merely because a claimant's reported degree
3 of pain is unsupported by objective medical findings. *Fair v. Bowen*,
4 885 F.2d 597, 601 (9th Cir. 1989). The following factors may also be
5 considered: (1) the claimant's reputation for truthfulness; (2)
6 inconsistencies in the claimant's testimony or between his testimony
7 and his conduct; (3) claimant's daily living activities; (4)
8 claimant's work record; and (5) testimony from physicians or third
9 parties concerning the nature, severity, and effect of claimant's
10 condition. *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002).

11 If the ALJ finds that the claimant's testimony as to the severity
12 of her pain and impairments is unreliable, the ALJ must make a
13 credibility determination with findings sufficiently specific to
14 permit the court to conclude that the ALJ did not arbitrarily
15 discredit claimant's testimony. *Morgan v. Apfel*, 169 F.3d 595, 601-02
16 (9th Cir. 1999). In the absence of affirmative evidence of
17 malingering, the ALJ's reasons must be "clear and convincing."
18 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9th Cir. 2007);
19 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001); *Morgan*, 169
20 F.3d at 599. The ALJ "must specifically identify the testimony she or
21 he finds not to be credible and must explain what evidence undermines
22 the testimony." *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir.
23 2001)(citation omitted).

24 In this case, the ALJ found Plaintiff's statement concerning the
25 intensity, persistence and limiting effects of her symptoms are not
26 credible to the extent they are inconsistent with the RFC assessment.
27 (Tr. 25-26.) Plaintiff argues the ALJ did not specifically discuss
28 why her testimony that she must lie down with a heating pad up to

1 seven times a day for 30 minutes was rejected. (Ct. Rec. 14 at 16-
2 17.) Plaintiff also asserts the ALJ did not state why Plaintiff's
3 limited abilities to sit, stand, walk, lift and carry were not
4 credible. (Ct. Rec. 14 at 17.) However, the ALJ mentioned
5 Plaintiff's testimony regarding her need to lay down with a heating
6 pad and "her current testimonial assertions of disability
7 limitations," which includes her claimed limitations on sitting,
8 standing, walking, lifting and carrying. (Tr. 24-25.) The ALJ
9 provided several reasons for rejecting Plaintiff's credibility, all of
10 which are legally sufficient and supported by substantial evidence.

11 First, the ALJ found that although Plaintiff has a mild disc
12 herniation, her subjective complaints have repeatedly been found to be
13 out of proportion to all objective and clinical evidence. (Tr. 25.)
14 While a claimant's pain testimony may not be rejected solely because
15 it is unsupported by objective medical findings, *Fair v. Bowen*, 885
16 F.2d 597, 601 (9th Cir. 1989), objective medical evidence obtained from
17 the application of medically acceptable clinical and laboratory
18 diagnostic techniques is a useful indicator in making reasonable
19 conclusions about the intensity and persistence of symptoms. 20
20 C.F.R. § 416.929(c)(2). See, also, *Rollins v. Massanari*, 261 F.3d
21 853, 857 (9th Cir. 2001). In evaluating credibility, the ALJ should
22 consider the degree to which the individual's statements are
23 consistent with the medical signs and laboratory findings and other
24 information provided by medical sources, including information about
25 medical history and treatment. S.S.R. 96-7p. The ALJ, therefore,
26 properly considered the results of objective clinical evidence in
27 evaluating Plaintiff's testimony.

28 The ALJ cited Dr. Henry, Plaintiff's treating physician, who

1 indicated that he tried every modality available with little success.
2 (Tr. 123.) Dr. Henry referred Plaintiff to a physiatrist for
3 additional pain treatment, but Plaintiff failed to make an
4 appointment. (Tr. 124-25.) Dr. Henry noted that Plaintiff said she
5 had been given "the runaround" from the physiatrist's office, but the
6 physiatrist's office reported leaving multiple messages which had not
7 been returned by Plaintiff. (Tr. 124.) Furthermore, the ALJ
8 observed that Plaintiff failed to pursue physical therapy. (Tr. 20-
9 21, 25.) After five physical therapy treatments, Plaintiff said she
10 would call to schedule additional appointments but the record reflects
11 no additional visits. (Tr. 117.)

12 Additionally, the ALJ pointed out a treating provider described
13 Plaintiff's complaints of low back pain, numbness and tingling in her
14 feet, increased lower back pain, insomnia, anxiety, nausea and
15 vomiting as "multiple somatic complaints." (Tr. 25, 253.) An
16 orthopedist who evaluated Plaintiff in 2006 identified "significant
17 functional overlay" and questioned her motivation to work. (Tr. 25,
18 158.) A 2008 physical evaluation was unremarkable. (Tr. 25, 221-23.)
19 Indeed, Dr. Rose, the examining physician, noted the findings were
20 neither consistent with the severity of Plaintiff's complaints, nor
21 were the complaints consistent with radiographic or medical source
22 data in the file. (Tr. 223.)

23 The ALJ also cited 2006 psychological testing which revealed
24 Plaintiff has a personality profile of an individual who would report
25 a wide variety of physical problems which tend to wax and wane, and
26 secondary gain is often present. (Tr. 25.) In 2008, Dr. Everhart
27 conducted a psychological examination and noted that Plaintiff
28 exhibited some pain behaviors, but her persistence was good and

1 attention and concentration were maintained. (Tr. 219.) Dr.
2 Everhart's only diagnosis was adjustment disorder with anxiety and
3 depressed mood, mild, and she assessed a GAF of 70. (Tr. 218-19.)

4 The foregoing evidence was reasonably considered by the ALJ in
5 evaluating Plaintiff's complaints. The opinions of and objective
6 testing conducted by Plaintiff's treating and examining physicians and
7 psychologists supports the ALJ's conclusion that Plaintiff's
8 complaints are out of proportion to the medical evidence.

9 A second reason cited by the ALJ in rejecting Plaintiff's pain
10 testimony is that, despite numerous evaluations and consultations,
11 Plaintiff has had no significant treatment other than narcotic pain
12 medication since 2004. (Tr. 25.) Medical treatment received to
13 relieve pain or other symptoms is a relevant factor in evaluating pain
14 testimony. 20 C.F.R. §§ 416.929(c)(3)(iv) and 416.929.(c)(3)(v). The
15 ALJ is permitted to consider the claimant's lack of treatment in
16 making a credibility determination. *Burch v. Barnhart*, 400 F.3d 676,
17 681 (9th Cir. 2005). Plaintiff had limited chiropractic and physical
18 therapy treatments and a course of steroid injections, but no surgical
19 or other significant intervention was been indicated. (Tr. 81-103,
20 108-11, 113-17.) Additionally, Plaintiff testified at the hearing
21 that she has not been treated by a doctor for back pain in over a year
22 and that she was taking only over-the-counter pain relievers. (Tr.
23 281-82.) A lack of prescription medication is an appropriate
24 consideration in determining credibility. *See Tidwell v. Apfel*, 161
25 F.3d 599, 602 (9th Cir. 1998). The ALJ noted his interpretation of the
26 lack of medical treatment is supported by other evidence such as the
27 description of Plaintiff's complaints as somatic, Dr. Henry's
28 dismissal of Plaintiff as a patient, and Plaintiff's personality

1 profile indicative of individuals endorsing somatic complaints for
2 secondary gain. (Tr. 25.) The ALJ's conclusion that a lack of
3 significant treatment suggests Plaintiff's pain complaints are
4 exaggerated is a reasonable interpretation of the evidence, and the
5 ALJ's reasoning is supported by substantial evidence.

6 Third, the ALJ cited inconsistencies between Plaintiff's
7 activities of daily living and her testimony regarding disability
8 limitations. (Tr. 25.) Evidence about daily activities is properly
9 considered in making a credibility determination. *Fair*, 885 F.2d at
10 603. However, a claimant need not be utterly incapacitated to be
11 eligible for benefits. *Id.* Many activities are not easily
12 transferable to what may be the more grueling environment of the
13 workplace, where it might be possible to rest or take medication. *Id.*
14 Yet daily activities may be grounds for an adverse credibility finding
15 if a claimant is able to spend a substantial part of the day engaged
16 in pursuits involving the performance of physical functions that are
17 transferable to a work setting. *Orn v. Astrue*, 495 F.3d 625, 639 (9th
18 Cir. 2007). Despite testimony to the contrary, Plaintiff reported to
19 Dr. Everhart that she was able to do dishes, laundry, cooking,
20 cleaning and grocery shopping.¹ (Tr. 218.) Dr. Everhart also noted
21 Plaintiff needs no help with her activities of daily living and
22 Plaintiff reported that she enjoys reading for a couple of hours at a
23 time, playing video games, talking on the phone and being around
24 people. (Tr. 218-19.) The ALJ reasonably interpreted Plaintiff's
25 reported activities and her inconsistent testimony about those

26
27 ¹Plaintiff testified that she does not do dishes, clean, sweep,
28 mop, or vacuum. She testified that she occasionally goes for short
grocery runs. (Tr. 284.)

1 activities as undermining her credibility.

2 Based on the foregoing, the ALJ's credibility analysis is
3 sufficiently specific and detailed to demonstrate the ALJ did not
4 arbitrarily dismiss Plaintiff's pain complaints. *See Morgan*, 169 F.3d
5 at 601-02. The reasons cited by the ALJ for rejecting Plaintiff's
6 testimony are clear and convincing and are supported by substantial
7 evidence. Thus, the ALJ did not err.

8 **2. Ms. Hendrickson**

9 Plaintiff asserts the ALJ did not provide reasons for
10 disregarding the opinion of Carolyn Hendrickson, ARNP. (Ct. Rec. 14
11 at 17.) On January 25, 2006, Ms. Hendrickson completed a DSHS
12 physical evaluation form after an office visit. (Tr. 250, 258-61.)
13 Ms. Hendrickson indicted that Plaintiff's low back strain and disc
14 protrusion at L5-S1 caused a "very significant" interference with
15 Plaintiff's ability to perform one or more basic work-related
16 activities. (Tr. 260.) She opined that Plaintiff's work level was
17 "severely limited," defined as "unable to lift at least 2 pounds or
18 unable to stand and/or walk." (Tr. 260.)

19 In a disability proceeding, the ALJ must consider the opinions of
20 acceptable medical sources. 20 C.F.R. §§ 404.1527(d), 416.927(d);
21 S.S.R. 96-2p; S.S.R. 96-6p. Acceptable medical sources include
22 licensed physicians and psychologists.² 20 C.F.R. §§ 404.1513(a),
23 416.913(a). In addition to evidence from acceptable medical sources,
24 the ALJ also may use evidence from "other sources" including nurse
25

26 ²Other acceptable medical sources are licensed podiatrists and
27 optometrists and qualified speech-language pathologists, in their
28 respective areas of specialty only. 20 C.F.R. §§ 404.1513(a),
416.913.(a).

1 practitioners, physicians' assistants, therapists, teachers, social
2 workers, spouses and other non-medical sources. 20 C.F.R. §§
3 404.1513(d), 416.913(d).

4 Social Security Ruling 06-3p summarizes regulations providing
5 that only an acceptable medical source can: (1) establish the
6 existence of a medically determinable impairment; (2) provide a
7 medical opinion; and (3) be considered a treating source. Evidence
8 from other sources can be used to determine the severity of an
9 impairment and how it affects the ability to work. S.S.R. 06-3p; 20
10 C.F.R. §§ 404.1513(d), 416.913(d). "Information from other sources
11 cannot establish the existence of a medically determinable impairment.
12 . . . However, information from 'other sources' may be based on
13 special knowledge of the individual and may provide insight into the
14 severity of the impairment(s) and how it affects the individual's
15 ability to function." S.S.R. 06-3p.

16 In evaluating the evidence, the ALJ should give more weight to
17 the opinion of an acceptable medical source than that of an "other
18 source." 20 C.F.R. §§ 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d
19 967, 970-71 (9th Cir. 1996). However, the ALJ is required to "consider
20 observations by non-medical sources as to how an impairment affects a
21 claimant's ability to work." *Sprague v. Bowen*, 812 F.2d 1226, 1232
22 (9th Cir. 1987).

23 An ALJ must give reasons "germane" to lay witness testimony
24 before discounting it. *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir.
25 1993). It is appropriate to discount lay testimony if it conflicts
26 with medical evidence. *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th
27 Cir. 1984). Lay testimony can never establish disability absent
28 corroborating competent medical evidence. See *Nguyen v. Chater*, 100

1 F.3d 1462, 1467 (9th Cir. 1996).

2 Ms. Hendrickson is an ARNP, or "other source," so the ALJ was
3 required to provide germane reasons for rejecting the opinion.
4 Although Plaintiff asserts the ALJ "did not provide any reason as to
5 basically why he disregarded Carolyn Hendrikson's [sic] opinion," the
6 ALJ did discuss the opinion and explained why it was rejected. (Ct.
7 Rec. 14 at 17, Tr. 21.)

8 First, the ALJ noted that Ms. Hendrickson's opinion is not
9 supported by the clinical or objective evidence. (Tr. 21.)
10 Inconsistency with medical evidence is a germane reason for rejecting
11 lay witness evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th
12 Cir. 2005); *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001). Among
13 other evidence supporting the ALJ's conclusion is an orthopedic
14 evaluation in September 2006 which indicated lumbar disc pathology
15 with subjective nerve complaints, neck pain without any objective
16 findings, and functional overlay interfering with the evaluation.
17 (Tr. 21, 158.) The orthopedist concluded Plaintiff was capable of
18 light work. (Tr. 158.) Additionally, a physical evaluation in March
19 2008 revealed that despite Plaintiff's pain complaints, the
20 examination was unremarkable. (Tr. 21, 221-23.) It was noted that
21 the findings were inconsistent with the severity of the complaints
22 and the complaints were inconsistent with the radiographic and medical
23 source data. (Tr. 223.) The ALJ properly gave these opinions from
24 acceptable medical sources supported by objective findings more weight
25 than Ms. Hendrickson's opinion. Therefore, the ALJ's first reason for
26 rejecting Ms. Hendrickson's opinion is germane to the witness and is
27 supported by substantial evidence.

28 Second, the ALJ pointed out that Plaintiff admitted being more

1 functionally and physically active than indicated by Ms. Hendrickson's
2 opinion. (Tr. 21.) Ms. Hendrickson's assessment indicates Plaintiff
3 is unable to lift two pounds and is unable to stand or walk. (Tr.
4 260.) Plaintiff testified she can lift two to four pounds and
5 reported she can sit or stand for 15-20 minutes at a time. (Tr. 60,
6 280.) Plaintiff testified that she can stand for five minutes and can
7 walk a city block. (Tr. 279.) The ALJ's determination that
8 Plaintiff's own admissions undermine the reliability of Ms.
9 Hendrickson's assessment is appropriate. Therefore, the ALJ's second
10 reason for rejecting Ms. Hendrickson's opinion is germane and is
11 supported by substantial evidence.

12 Third, the ALJ pointed out that Ms. Hendrickson's opinion was
13 generated at Plaintiff's request to re-establish general assistance
14 benefits. (Tr. 21.) Ms. Hendrickson's January 2006 notes state that
15 Plaintiff "presents to the clinic a GAU evaluation. Apparently she
16 has lost her benefits and needs to get those reestablished." (Tr.
17 250.) The ALJ went on to assert, "DSHS evaluations are known to be
18 lenient, and for the primary purpose of continuing claimants'
19 assistance benefits." This portion of the ALJ's analysis is not based
20 on evidence in the record and is also not germane to the witness.
21 However, because the ALJ cited other germane reasons for rejecting the
22 opinion, any error by the ALJ is harmless because it does not affect
23 the ALJ's ultimate nondisability determination. *See Parra v. Astrue*,
24 481 F.3d 742, 747 (9th Cir. 2007); *Curry v. Sullivan*, 925 F.2d 1127,
25 1131 (9th Cir. 1990); *Booz v. Sec'y of Health & Human Servs.*, 734 F.2d
26 1378, 1380 (9th Cir. 1984).

27 The ALJ cited germane reasons for rejecting Ms. Hendrickson's
28 opinion. Ms. Hendrickson's assessment is inconsistent with evidence

1 from acceptable medical sources and with Plaintiff's own testimony.
2 As a result, the ALJ did not err in rejecting the opinion.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, this court
5 concludes the ALJ's decision is supported by substantial evidence and
6 is not based on error. Accordingly,

7 **IT IS ORDERED:**

8 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
9 **GRANTED.**

10 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
11 **DENIED.**

12 The District Court Executive is directed to file this Order and
13 provide a copy to counsel for Plaintiff and Defendant. Judgment shall
14 be entered for Defendant and the file shall be **CLOSED.**

15 DATED July 12, 2010.

16
17 S/ CYNTHIA IMBROGNO
18 UNITED STATES MAGISTRATE JUDGE
19
20
21
22
23
24
25
26
27
28